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No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
MELVA M. GRANEY,
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For the most part the taxpayer disregards the legal question of statutory construction and attempts to support the decision below simply by reference to provisions of the settlement agreement which he contends preclude a conclusion that a portion of his payments are being earmarked as payable for child support. In the record (pp. 7–8, 10–12) we printed what we considered to be the significant portions of the settlement agreement. Since the taxpayer's argument is so predominantly factual, we are printing the entire agreement (Exhibit 1) as an appendix to this brief.

1. The taxpayer's primary contention is that the amounts payable for the support of minor children

are not fixed by the settlement agreement because the agreement provides that all payments by the husband to the wife shall terminate upon the remarriage of the wife (Br. 9–12). That provision is really of no significance here. The settlement agreement states that it is to be construed and interpreted under and in accordance with the laws of the State of California (R. 8). Under California law, the primary obligation to support minor children is on the husband[1] and a minor child's right to support may not be barred by an agreement between husband and wife.[2] Indeed, there are various provisions in the present agreement in which the husband clearly recognizes his continuing obligation to support the children without regard to the agreement (R. 7–8, 10, 11). The clause on which the taxpayer relies is merely a termination clause, specifying an event which terminates alimony to the wife but as to any minor child merely leaves the arrangement for his support for future determination. We are here concerned only with the amount payable for child support during the effective period of the agreement.

This amount is reflected in the provision of the agreement which provides that the total of periodic payments to be made by the husband to the wife shall be reduced by one-sixth upon the death, marriage or emancipation of each child, a total of one-half for the three children. Prior to any such event, which in-

[1] Section 196 of the California Civil Code, as interpreted in *Metson* v. *Metson*, 56 Cal. App. 2d 328, 333, and *Newell* v. *Newell*, 146 Cal. App. 2d 166, 178.

[2] See *Allen* v. *Allen*, 138 Cal. App. 706; *Smith* v. *Smith*, 125 Cal. App. 2d 154; *Smith* v. *Smith*, 131 Cal. App. 2d 764.

cludes the taxable years involved here, the husband's continuing obligation to support all three children is satisfied by the payment of this one-half. Thus, during the time of full payments he receives the benefit from the portion paid for child support and is properly taxed on this amount. A reduction in the amount of payments comes about only when his obligation to support a child comes to an end, *e.g.*, when the child dies, marries or becomes emancipated, or when he more directly assumes his obligation under the law to support the children (*i.e.*, when and if the wife remarries).

2. Relying upon the provisions of the agreement relating to the *maximum* amount payable to the wife (par. 11), the taxpayer implies that the total payments to the wife would remain the same even if all of the children were killed in a disaster (Br. 12). But, as he apparently concedes (n. 9, Br. 12), the maximum payments in that event would be reduced 50 percent (to 25 percent the first year, to 12½ percent the second and third year, and to only 10 percent of his gross income after the third year). Since the reduction clause applies and reduces the amounts which "would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof," the agreement, in our view, likewise reduces the maximum amount payable. In any event, it is most unlikely (and certainly not contemplated by the agreement) that the wife "would receive the same amount whether or not she was supporting the children" (Br. 12).

3. The taxpayer asserts that the parties intended the wife to pay the tax on the child-support money, and that to tax him instead would work a hardship (Br. 8). But Congress has provided that the terms of the agreement control the incidence of the tax and, presumably, the agreement was written with the provisions of the statute and its long-standing interpretation in mind. All that the agreement refers to in relation to taxes is that each party shall pay taxes *assessable* to them (paragraphs 9 and 11 (d)). Under the statute this means that the wife must pay tax on the part of the periodic payments payable as alimony and that the husband must pay tax on the portion payable for child support, the amount thereof having been fixed by the terms of the agreement.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MELVA M. GRANEY,
C. GUY TADLOCK,
NORMAN H. WOLFE,
Attorneys.

APRIL 1961.

APPENDIX

Property Settlement Agreement

Agreement between Ardell Lester, hereinafter called "wife", and Jerry Lester, hereinafter called "husband", dated at Beverly Hills, California, this 16th day of April, 1951.

The parties contract with reference to the following facts:

(a) That husband and wife were married on August 24, 1934, in Los Angeles, California.

(b) That the parties have three children, issue of the marriage of the parties, to wit, Judy Lester, age 13, Joan Lester, age 11, and Jay Lester, age 9.

(c) The parties have separated and are now living separate and apart.

(d) The parties desire by this agreement to settle for all times their respective property rights, interests, duties and obligations with respect to each other, and to arrange by agreement for the making of periodic payments to the wife as and for the maintenance and support for her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship between the parties, whether or not a divorce or decree of separation may hereafter be granted in favor of either of the parties hereto against the other.

(e) This agreement is made voluntarily by both parties free from duress or influence on the part of the other and each has had independent advice of counsel.

(f) The wife is familiar with the husband's earning capacity and a full disclosure has been made by the parties of all of the property heretofore acquired by either of the parties in the name of the parties or in the name of either of them.

(g) An action for separate maintenance is pending between the wife as plaintiff and the husband as defendant, said action having been instituted in the Superior Court of the State of California in and for the County of Los Angeles, and being entitled, "*Ardell Lester, Plaintiff*, v. *Jerry Lester, et al., Defendants*, Number S.M.D. 8064."

In consideration of the above, and other good and valuable considerations moving one to the other, it is agreed between the parties as follows:

1. The parties agree that they shall live separate and apart and each shall be free from interference, authority or control by the other as fully as if he or she were unmarried, and each may conduct, carry on, and engage in any employment, business, or trade and/or carry on his or her personal affairs in such manner as to him or her shall deem advisable for his or her own sole use and benefit, free from any control, restraint or interference, direct or indirect by the other party, in all respects as if each were unmarried. They agree that they will not molest or compel or seek to compel the other party to cohabit or dwell with him or her by any proceedings for the restoration of conjugal rights or otherwise.

2. Except as herein otherwise expressly provided, each of the parties hereto does hereby release, relinquish, quitclaim and surrender to the other, his or her heirs, executors, administrators, assigns, property and estate, all and every right as the spouse of the other, and any and all present or future claims or demands of every nature on or against the other, or on or against the property of the other, including

but not limited to the right to claim a family allowance upon the death of the other, future support and maintenance, alimony pendente lite and permanent alimony. Each of the parties hereto as the spouse of the other does hereby release, relinquish, quitclaim and surrender all rights or demands in law or equity to any and all property which the other may now own hereunder or hereafter acquire, and all rights to the same at the death of the other, and all rights as the heir of the other, as well as the right to act as administrator or administratrix of the estate of the other by reason of the relationship of husband and wife now existing, or which may exist between them at the time of the death of the other; except that either party may act as the executor or executrix of the Will of the other if so nominated or appointed therein. Each of the parties hereto hereby agrees not to contest any Will now in existence or that may hereafter be made of or by the other party.

3. Except as the same may be subjected to the claims and rights hereinafter provided for the benefit of the wife and the children, henceforth and forever, any property now owned or that may hereafter be acquired by either of the parties hereto by gift, devise, descent, distribution, purchase, exchange or in any other manner whatsoever, including property transferred herein, shall be the sole and separate property of the party acquiring the same; and this agreement shall operate as and is intended as a release, relinquishment, quitclaim and surrender by each of the parties hereto of any rights he or she may have or assert or claim to have in or to any and all such property.

4. (a) Except as may be herein otherwise specifically provided, the wife hereby agrees to hold the husband harmless of and from any and all debts,

liabilities and obligations suffered or incurred by the wife either before or after the date of execution hereof. In the event that any action or proceeding shall be commenced against the husband on account of any such debt, liability or obligation, then and in each such event the wife assumes and agrees to pay all expenses, costs and attorneys' fees suffered or incurred by the husband in the defense of any such action or proceeding; provided, however, that the wife shall have the right at her own cost and expense to provide the husband with counsel for the defense of any such action or proceeding.

(b) The husband hereby agrees to hold the wife harmless of and from all debts, liabilities and obligations heretofore incurred by him up to the date hereof, and/or hereafter suffered or incurred by him. In the event that any action or proceedings shall be commenced against the wife on account of any debt, liability or obligations heretofore suffered or incurred by the husband, or hereafter incurred by the husband, then and in each such event, the husband assumes and agreees to pay all expenses, costs and attorneys' fees suffered or incurred by the wife in the defense of any such action or proceeding; provided, however, that the husband shall have the right at his own cost and expense to provide the wife with counsel for the defense of any such action or proceeding.

(c) In the event that either of the parties hereto is required to pay, disburse, or incur any obligation, cost or expense by reason of the foregoing and as to which obligation, cost or expense said party was to be held harmless, the amount of such obligation, cost or expense shall immediately become due and payable by the other and may be offset and credited against any amounts or other sums due to such indebted party.

5. All of the future earnings and/or accumulations

of the husband or the wife from and after the date of the execution of this agreement shall be and remain the sole and separate property and estate of the party so earning or accumulating the same, and shall not be deemed to be community property at any time whatever, or at all.

6. Each of the parties hereto shall make, execute, deliver and acknowledge unto the other, upon demand and without charge or expense, any instrument that may be necessary or convenient in order to carry out or execute any of the terms of this agreement, or to vest in the respective parties fully and completely, as their own separate property and estate, any property, real or personal, that is hereby vested, or that may be hereafter acquired, by either of them.

Without limiting the generality of the foregoing, it is hereby expressly agreed that each of the parties hereto will make, execute, deliver and acknowledge unto the other, upon demand and without charge or expense, any instrument required by any bank, title company, trust company or insurance company as evidence of the separate character of any property of the respective parties hereto.

7. Upon the effective date of this agreement (as said term is defined in article 11, subdivision (j)), the husband agrees to pay to the wife the sum of Ten Thousand Dollars ($10,000.00). In addition, the husband does hereby assign, transfer and convey to the wife all of his right, title and interest in and to the following property, and it is hereby agreed that henceforth all of the following property shall be the sole and separate property of the wife, to wit:

(a) All of the clothing, furs, personal effects and jewelry of the wife.

(b) That certain 1948 Hudson Sedan, Engine No. 48281996, now registered in the name of the wife.

(c) That certain 1947 Ford Station Wagon, Motor No. 799A1681229.

(d) All of the right, title and interest of the husband in and to the real property which is now the home of the parties, located at 418 Denslow, West Los Angeles, California, legally described as follows:

> All that real property situated in the County of Los Angeles, State of California, described as: Lot 4 in Block 3 of Tract 9924 as per map recorded in Book 1.4, Pages 21-23 of Maps in the office of the Recorder of said County.

(e) All of the furniture, furnishings, household equipment and every personalty of every kind and character now situated at 418 Denslow, West Los Angeles, California.

(f) All insurance policies of any kind or character which the husband or the parties may now own insuring any and all of the property listed in this Article 7 against damage, loss, destruction or theft; and all results and proceeds of or from any such insurance policies; also, all personal liability insurance policies on the automobiles listed in subdivisions (b) and (c) of this Article 7.

(g) Any and all bank accounts standing in the name of the wife.

8. The wife does hereby assign, transfer and convey to the husband all of her right, title and interest in and to the following property, and it is hereby agreed that henceforth all of the following property shall be the sole and separate property of the husband:

(a) All of the clothing, personal effects and jewelry of the husband, wherever the same may be located.

(b) That certain 1949 Cadillac Automobile, now registered in the name of the husband, and located in New York City.

(c) Bank accounts of the parties now in the name of the husband or for his purposes and uses, being a commercial account at the National City Bank & Trust Co. having an approximate balance as of March 1, 1951 of $14,000, and a term savings account at the Franklin Savings Bank and the Union Dime Savings Bank having an approximate balance as of March 1, 1951 of $12,000.

(d) All insurance policies of any kind or character which the husband or the parties may now own, insuring any and all of the property listed in this numbered Article against damage, loss or destruction; and all results and proceeds of or from any such insurance policies.

(e) Life insurance policies identified as follows, and all having been issued by the New York Life Insurance Company:

Policy #17871908 in the sum of $25,000
Policy #18014196 in the sum of $25,000
Policy #18014197 in the sum of $25,000

The foregoing policies are subject, however, to the following terms and conditions:

(i) So long as the husband is required to pay the wife the sums and amounts set forth in Article 11 hereof, but in no event later than January 1, 1954, he will cause the wife to be named and designated as the sole and irrevocable beneficiary to the extent of $20,000 of the proceeds which might be payable pursuant to said policies, or any of them.

(ii) So long as the husband is required pursuant to the terms and provisions of this agreement or by law, to maintain and support all of the children of the parties, he will cause all of the children to be jointly named as the sole and irrevocable beneficiaries to the extent of $30,000 of the proceeds which might be payable pursuant to said policies, or any of them. In the

event that the said obligation of the husband shall cease or terminate as to any of said children, such child may be withdrawn as such designated beneficiary, although the obligation herein set forth shall continue with respect to the other children.

(iii) Husband shall subject to the provisions hereof have the right to deal with said policies in any manner he may determine except that he may not cancel such policies. The husband further agrees that arrangements will be made so that due and timely duplicate notices of all premiums due, and duplicate receipts of all premiums paid with respect to said policies, will be sent to the wife, or as she may direct. In the event the husband fails to pay any such premiums when due, the wife shall have the right to make such payment and to forthwith demand reimbursement in such amount from the husband. The husband agrees upon such demand to immediately reimburse the wife, failing in which the amount so due the wife by reason of such advance shall bear interest at the rate of seven percent (7%) per annum until paid.

(f) Any and all funds which are now the subject of an order issued by the Superior Court in and for the County of Los Angeles in those certain proceedings entitled, "Ardell Lester, Plaintiff, versus Jerry Lester, et al, Defendants, No. S.M.D. 8064", whether or not the same have been turned over pursuant to such order to the Receiver heretofore appointed in such proceedings, and after the payment therefrom of all sums ordered to be paid therefrom, including costs, expenses, receiver's fees, and the like (but exclusive of any attorneys' fees).

(g) Any and all funds held for the account of the husband by National Broadcasting Company, Inc. or any other person, firm, or corporation against

whom process has issued in the proceedings hereinabove referred to.

(h) Any and all other property which is not of sufficient or substantial value so as to materially alter the rights of the wife to claim or assert any rights therein.

9. The wife agrees to execute with the husband separate income tax returns, both federal and state, covering their joint or community income received up to the date of the execution of this agreement. For income received subsequent thereto, the husband and wife shall each file separate returns which may hereafter be filed by them. The husband agrees that he will pay all federal and state income taxes on the income of the husband and wife from the date of the marriage of the parties hereto up to and including the effective date of this agreement. Where such taxes have not been paid, or in the event additional assessments should in the future be levied for income received during said period of time, the husband agrees to hold the wife free and harmless therefrom and to indemnify her against any loss on account thereof. Nothing herein contained, however, shall prevent the husband from contesting and disputing the validity and amount of any claim for income taxes during said period, and the husband shall be entitled to litigate any such claims or demands, whether made against the husband or the wife, or both.

10. The parties do hereby acknowledge that the welfare and best interests of the minor children of the parties hereto are of paramount concern and interest to the parties. The parties hereto acknowledge that each is a fit and proper person to have the care, custody and control of the children but agree that the welfare and interests of the minor children of the parties hereto will best be served by the arrange-

ment in this Article 10 set forth. The foregoing, however, shall be deemed to be a statement of intention and shall not be unnecessarily construed as a bar to the rights herein granted to the husband with respect to the rights of visitation and vacation as hereinafter set forth.

The wife shall have the care, custody and control of the minor children of the parties hereto, subject to the husband's reasonable right of visitation with each and all of the minor children at all reasonable times, either at the home of the wife, or at such other places as the husband may from time to time elect. When the husband shall elect to exercise his right of visitation away from the home of the wife, he shall furnish transportation for the minor children from and to the home of the wife.

Except as permitted in the next following paragraph, neither of the parties shall remove any of the said minor children from the State of California without first securing the written consent of the other party or the order of a Court having jurisdiction in the premises after reasonable notice has been first given to the other party.

The husband shall have the right to have the children, or any of them, stay with him during the summer vacation for a period not to exceed thirty (30) days, provided that suitable arrangements are made for their accommodations and transportation, and provided further, that their normal and usual habits, welfare, health and activity are not unduly disturbed or affected, all, of course, being intended to be governed by the aforesaid premise that the paramount concern and interest of the parties is the welfare and health of said children.

11. The husband agrees to pay the wife for the support and maintenance of herself and the children

of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):

(a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.

(b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of husband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.

(e) "Gross income" as used in this Article 11, is hereby defined to be all income, as such term is defined by the Internal Revenue Code, actually or constructively received by the husband after the effective date of this agreement. Gross income shall be computed before taking into account deductions of any kind, including but not limited to, agents' commissions, and any form of payroll taxes and/or withholdings and such income shall be computed upon the cash receipts basis, as distinguished from the accrual

method of accounting, except that the last accounting period hereunder shall be computed on the accrual basis. Whenever the gross income thus received shall consist of property instead of money, or property together with money, then such property shall be included in gross income at its fair market value at the time of receipt of such property by the husband, but if such property shall at the time of its receipt have no substantial fair market value, then the appreciation thereon, when realized, shall be included in gross income. If, however, such appreciation is not realized before the termination of the payments, as hereinafter provided, then it is agreed that the husband shall pay the wife, notwithstanding anything herein contained to the contrary, a sum equal to 20% of such appreciation when realized. In the event that husband shall sell or otherwise deal in his interest in any contract or agreement which arises from his personal services or from the use of his likeness or name, or from the sale of any goods, wares, merchandise or services bearing or identified with his likeness or name, then the proceeds from any such sale or dealing shall be deemed to be gross income from his personal services or from the use of his likeness or name. If husband renders his services directly or indirectly to, for or on account of any business, firm, copartnership, joint venture or corporation, in which he owns or controls, directly or indirectly, a substantial amount of the capital stock, or otherwise owns or controls, directly or indirectly, a substantial interest in the same, irrespective of the compensation actually paid to the husband for such services, there shall be included in the husband's gross income for the purposes of this Article 11, either the actual amount paid to husband for such services, or a sum equal to the reasonable value of such services, which-

ever is the greater. With reference to services rendered by the husband in connection with "package deals" (as such term is understood in the radio and television broadcasting industries), it is understood and agreed that for the purposes of this subdivision (e) the husband's gross income therefrom shall be that amount remaining after the deduction from the gross amount paid for such package deal of the following expenses only:

(i) Compensation and salaries to other performing artists and personnel.

(ii) Compensation or royalties paid to writers, directors or producers thereof.

(iii) Such other expenses which would not usually be the obligation of the husband if he were rendering his services directly and not through the conduit or means of a "package deal".

(f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated.

(g) The payments provided for above shall be made as follows:

The portion of the year from the effective date of this agreement until the next January 1st, each of the subsequent full calendar years prior to the date when the husband's obligation to make payment pursuant to this Article 11 ceases, and the period from the end of the last calendar year until the husband's obligation to make payments hereunder ceases, shall each be deemed a separate accounting unit. For example, if the effective date of this agreement should be May 1, 1951, and if the husband and wife should live and the wife should remarry

on July 1, 1953, the separate accounting units shall be as follows:

From May 1, 1951 until December 31, 1951, inclusive;

The calendar year 1952;

The period from January 1, 1953 until June 30, 1953, inclusive.

(h) Payments based on the income received by the husband in the preceding month shall be made by him on or before the 10th day of each month, in accordance with the formula hereinabove set forth. He shall pay as an advance only on account thereof the following weekly amounts, commencing with the end of the first week after the effective date of the agreement:

(i) During the first three accounting units (that is, from the effective date of the agreement to and including December 31, 1951, the calendar year 1952 and the calendar year 1953), the sum of $500.00 weekly.

(ii) Thereafter, $300.00 weekly.

Such payments shall be accompanied by a complete statement showing the sources and amounts of compensation received which is subject to the provisions of this agreement, and reflecting the credit to which the husband is entitled for the weekly payments theretofore made. If such weekly payments exceed the amount due, then husband may suspend subsequent weekly payments to the extent of and until he has recouped the amount of such excess credit.

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In

the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

(j) This agreement shall become fully effective upon the execution hereof by the parties hereto. However, the phrase "the effective date of this agreement" as used herein in this Article 11 hereof shall be the day following the obtaining of a final or interlocutory decree of divorce, or decree of separate maintenance, whichever shall first occur, or by one or the other of the parties.

(k) The terms and provisions of this Article 11 insofar as they refer to the amount of the payments to the wife, shall not be modified, amended or altered except by and with the mutual consent of the parties hereto, and each of the parties hereto agrees not to apply or petition to any court having jurisdiction in the premises for a modification or change in the amount of such payments.

12. The parties recognize that the services rendered and to be rendered to the wife by her attorneys in connection with the present differences which have occurred between the parties will consist of three distinct categories of service, namely, the services rendered in connection with: (a) the status and the custody and control of their children; (b) the division of the parties' community property; (c) an amount of support and maintenance payable by the husband to the wife in discharge of his obligation to support and maintain said wife and children. The parties agree that the husband shall pay for the services included in the categories above described under (a)

and (b), but the wife agrees to pay to her attorneys, without reimbursement from the husband, all sums which may become due and payable to them in respect of services rendered and to be rendered in connection with the category above described under (c), that is, the services rendered in connection with an amount of support and maintenance payable by the husband to the wife in discharge of his obligation to support and maintain said wife and children. In full payment of husband's obligations under this Article 12, husband agrees to pay to the wife's attorneys the sum of $500.00, receipt of which sum is hereby deemed acknowledged by the wife and by her said attorneys. Other than is provided for herein and in Article 15, it is specifically understood that the husband shall not be liable to the wife for any attorneys' fees of any kind or nature whatsoever, and the wife does hereby release the husband from any right to claim or demand any costs or attorneys' fees of any kind or nature whatsoever, both with reference to the negotiation and execution of this agreement, as well as with reference to any action or proceeding which she might commence or prosecute against him for divorce or otherwise, and she specifically agrees that in any such action she will not ask for or claim any costs or attorneys' fees against him except as herein specifically excluded.

13. The husband agrees that the wife shall have the right to inspect and examine all of the records, documents and data with respect to his earnings and income which are or may be the subject of his obligations hereunder. The husband agrees to keep the wife advised as to where such records, documents and data are kept and maintained. Such examination may be made on behalf of the wife by her attorney or a Certified Public Accountant, and the information

therein contained shall be kept confidential. Husband shall deliver to the wife if requested by her, copies of income tax returns filed by him during the effective term of this agreement. Notwithstanding anything herein contained to the contrary, it is specifically understood and agreed that the wife shall have no rights of inspection of books and records as in this Article 13 provided during such unit that the husband has paid the wife the maximum amount as hereinbefore provided.

14. It is agreed that in any action or proceeding now pending or hereafter brought by either of the parties hereto for a divorce or for separate maintenance, this property settlement agreement shall be presented to the court for its approval and that there may be incorporated in any interlocutory or final judgment entered in such action, such of the executory terms and provisions hereof as counsel for the wife may deem necessary or advisable.

15. If any action is hereafter instituted by either of the parties to enforce any of the terms and provisions herein contained, exclusive of the action to be brought by wife referred to above in Article 14, then, in addition to all relief which may in said action be granted to the prevailing party the court may fix and assess a reasonable amount as and for attorneys' fees incurred by such prevailing party.

16. This agreement is entered into in the State of California, and shall be construed and interpreted under and in accordance with the laws of the State of California. It is expressly understood and agreed by the parties that should any paragraph, or any provision or portion of this agreement be held to be invalid, illegal or void, then and in such event, the paragraph, provision or portion of this agreement so held to be invalid, illegal or void, shall be deleted

from this instrument, and this instrument shall be read as though such invalid, illegal or void paragraph, provision or portion was never included herein, and the remainder of this agreement, excluding such invalid, illegal or void paragraph, provision or portion shall nevertheless subsist and continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have signed and executed this agreement the day and year first above written.

(s) Ardell Lester,
ARDELL LESTER, *wife.*

(s) Jerry Lester,
JERRY LESTER, *husband.*

Approved by:

PACHT, TANNENBAUM & ROSS,
By (s) N. JOSEPH ROSS,
Attorneys for Wife.

(s) LOUIS MANDEL,
Attorney for Husband.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 18th day of April, 1951, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared ARDELL LESTER, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(s) GERTRUDE CASTY,
Notary Public in and for said County and State.

STATE OF NEW YORK
County of New York, ss:

On this 16th day of April, 1951, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared JERRY LESTER, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(s) MOSES B. SHERR,
Notary Public.

U.S. GOVERNMENT PRINTING OFFICE: 1951

SUPREME COURT OF THE UNITED STATES

No. 376.—October Term, 1960.

Commissioner of Internal Revenue, Petitioner, v. Jerry Lester.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 22, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

The sole question presented by this suit, in which the Government seeks to recover personal income tax deficiencies, involves the validity of respondent's deductions from his gross income for the taxable years 1951 and 1952 of the whole of his periodic payments during those years to his divorced wife pursuant to a written agreement entered into by them and approved by the divorce court. The Commissioner claims that language in this agreement providing "[i]n the event that any of the [three] children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall . . . be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue" sufficiently identifies one-half of the periodic payments as having been "payable for the support" of the taxpayer's minor children under § 22 (k) of the Internal Revenue Code of 1939 and, therefore not deductible by him under § 23 (u) of the Code.[1] The Tax Court approved the Commissioner's dis-

[1] Section 22 (k) of the Internal Revenue Code of 1939, 56 Stat. 816-817, provided in part that

". . . periodic payments . . . received [by the wife] subsequent to [a decree of divorce] . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under . . . a written instrument incident to such divorce . . . shall be includible in the gross income of such wife . . . . This subsection shall not apply to that part of any

allowance, 32 T. C. 1156, but the Court of Appeals reversed, 279 F. 2d 354, holding that the agreement did not "fix" with requisite clarity any specific amount or portion of the periodic payments as payable for the support of the children and that all sums paid to the wife under the agreement were, therefore, deductible from respondent's gross income under the alimony provision of § 23 (u). To resolve a conflict among the Courts of Appeals on the question,[2] we granted certiorari. 364 U. S. 890. We have concluded that the Congress intended that, to come within the exception portion of § 22 (k), the agreement providing for the periodic payments must specifically state the amounts or parts thereof allocable to the support of the children. Accordingly, we affirm the judgment of the Court of Appeals.

Prior to 1942, a taxpayer was generally not entitled to deduct from gross income amounts payable to a former spouse as alimony, *Douglas* v. *Willcuts*, 296 U. S. 1 (1935), except in situations in which the divorce decree, the settlement agreement and state law operated as a complete discharge of the liability for support. *Helvering* v. *Fitch*, 309 U. S. 149 (1940). The hearings, Senate debates and the Report of the Ways and Means Committee of the House all indicate that it was the intention of Congress, in enacting § 22 (k) and § 23 (u) of the Code, to eliminate

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such periodic payment *which the terms of the . . . written instrument fix*, in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband." (Emphasis added.)

Section 23 (u), 56 Stat. 817, stated in pertinent part that there shall be allowed as a deduction

"[i]n the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year."

[2] Both *Metcalf* v. *Commissioner*, 271 F. 2d 288 (C. A. 1st Cir. 1959), *Eisinger* v. *Commissioner*, 250 F. 2d 303 (C. A. 9th Cir. 1957), have arrived at conclusions contrary to those of the court below.

the uncertain and inconsistent tax consequences resulting from the many variations in state law. "[T]he amendments are designed to remove the uncertainty as to the tax consequences of payments made to a divorced spouse . . . ." S. Rep. No. 673, Pt. 1, 77th Cong., 1st Sess. 32. They "will produce uniformity in the treatment of amounts paid . . . regardless of variance in the laws of different States . . . ." H. R. Rep. No. 2333, 77th Cong., 2d Sess. 72. In addition, Congress realized that the "increased surtax rates[3] would intensify" the hardship on the husband who, in many cases, "would not have sufficient income left after paying alimony to meet his income tax obligations," H. R. Rep. No. 2333, 77th Cong., 2d Sess. 46, and perhaps also that on the other hand, the wife, generally being in a lower income tax bracket than the husband, could more easily protect herself in the agreement and in the final analysis receive a larger net payment from the husband if he could deduct the gross payment from his income.

The first version of § 22 (k) was proposed by the Senate as an amendment to the Revenue Act of 1941. The sums going to child support were to be includible in the husband's gross income only if the amount thereof was "specifically designated as a sum payable for support of minor children of the spouses." H. R. 5417, 77th Cong., 1st Sess., § 117. The proposed amendment thus drew a distinction between a case in which the amount for child support was "specifically designated" in the agreement, and one in which there was no such designation. In the latter event, "the whole of such amounts are includible in the income of the wife . . . ." S. Rep. No. 673, Pt. 1, 77th Cong., 1st Sess. 35. Action on the

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[3] Sections 22 (k) and 23 (u) were enacted as part of the Revenue Act of 1942 which provided for greatly increased tax revenue to meet the expenses of World War II.

bill was deferred by the conference committee[4] and hearings on the measure were again held the following year. The subsequent Report of the Senate Finance Committee on § 22 (k) carried forward the term "specifically designated," used in the 1941 Report (No. 673), with this observation:

> "If, however, the periodic payments . . . are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22 (k) . . . ." S. Rep. No. 1631, 77th Cong., 2d Sess. 86.

As finally enacted in 1942, the Congress used the word "fix" instead of the term "specifically designated," but the change was explained in the Senate hearings as "a little more streamlined language." Hearings before Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 48. As the Office of the Legislative Counsel reported to the Senate Committee:

> "If an amount is specified in the decree of divorce attributable to the support of minor children, that amount is not income of the wife . . . . If, however, that amount paid the wife includes the support of children, *but no amount is specified for the support of the children*, the entire amount goes into the income of the wife . . . ." *Ibid.* (Italics supplied.)

This language leaves no room for doubt. The agreement must expressly specify or "fix" a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income. The statutory requirement is strict and carefully worded. It does not say that "a sufficiently clear purpose" on the part of the

[4] H. R. Rep. No. 1203, 77th Cong., 1st Sess. 11.

parties is sufficient to shift the tax. It says that the "written instrument" must "fix" that "portion of the payment" which is to go to the support of the children. Otherwise, the wife must pay the tax on the whole payment. We are obliged to enforce this mandate of the Congress.

One of the basic precepts of the income tax law is that "[t]he income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930). Under the type of agreement here, the wife is free to spend the monies paid under the agreement as she sees fit. "The power to dispose of income is the equivalent of ownership of it." *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940). Including the entire payments in the wife's gross income under such circumstances, therefore, comports with the underlying philosophy of the Code. And, as we have frequently stated, the Code must be given "as great an internal symmetry and consistency as its words permit." *United States* v. *Olympic Radio & Television*, 349 U. S. 232, 236 (1955).

It does not appear that the Congress was concerned with the perhaps restricted uses of unspecified child-support payments permitted the wife by state law when it made those sums includible within the wife's alimony income. Its concern was with a revenue measure and with the specificity, for income tax purposes, of the amount payable under the terms of the written agreement for support of the children. Therefore, in construing that revenue act, we too are unconcerned with the variant legal obligations, if any, which such an agreement, by construction of its non-specific provisions under local rules, imposes upon the wife to use a certain portion of the payments solely for the support of the children. The Code merely affords the husband a deduction for any por-

tion of such payment not specifically earmarked in the agreement as payable for the support of the children.

As we read § 22 (k), the Congress was in effect giving the husband and wife the power to shift a portion of the tax burden from the wife to the husband by the use of a simple provision in the settlement agreement which fixed the specific portion of the periodic payment made to the wife as payable for the support of the children. Here the agreement does not so specifically provide. On the contrary, it calls merely for the payment of certain monies to the wife for the support of herself and the children. The Commissioner makes much of the fact that the agreement provides that as, if, and when any one of the children married, became emancipated or died the total payment would be reduced by one-sixth, saying that this provision did "fix" one-half (one-sixth multiplied by three, the number of children) of the total payment as payable for the support of the children. However, the agreement also pretermitted the entire payment in the event of the wife's remarriage and it is as consistent to say that this provision had just the opposite effect. It was just such uncertainty in tax consequences that the Congress intended to and, we believe, did eliminate when it said that the child support payments should be "specifically designated" or, as the section finally directed, "fixed." It does not say that "a sufficiently clear purpose" on the part of the parties would satisfy. It says that the written instrument must "fix" that amount or "portion of the payment" which is to go to the support of the children.

The Commissioner contends that administrative interpretation has been consistently to the contrary. It appears, however, that there was such a contrariety of opinion among the Courts of Appeals that the Commissioner was obliged as late as 1959 to issue a Revenue Ruling which stated that the Service would follow the rationale of *Eisinger* v. *Commissioner*, 250 F. 2d 803 (C. A. 9th

Cir. 1957),[5] but that *Weil* v. *Commissioner*, 240 F. 2d 584 (C. A. 2d Cir. 1957),[6] would be followed "in cases involving similar facts and circumstances." Rev. Rul. 59–93, 1959–1 Cum. Bull. 22, 23.

All of these considerations lead to the conclusion that if there is to be certainty in the tax consequences of such agreements the allocations to child support made therein must be "specifically designated" and not left to determination by inference or conjecture. We believe that the Congress has so demanded in § 22 (k). After all, the parties may for tax purposes act as their best interests dictate; provided, as that section requires, their action be clear and specific. Certainly the Congress has required no more and expects no less.

Affirmed.

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[5] The court there approved the rule that "when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated . . . . the payments to be made, one part to be payable for alimony, and another part to be payable for the support of children, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come in being, then the 'part of any periodic payment' has been fixed 'by the terms of the decree or written instrument' . . . ." 250 F. 2d, at 308.

[6] In that case the agreement provided for reductions only in the event the divorced wife remarried. The court stated that "[t]he fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurred, will not suffice to shift the tax burden from the wife to the husband." 240 F. 2d, at 588.

SUPREME COURT OF THE UNITED STATES

No. 376.—October Term, 1960.

Commissioner of Internal Revenue, Petitioner, v. Jerry Lester.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 22, 1961.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I add a few words. In an early income tax case, Mr. Justice Holmes said "Men must turn square corners when they deal with the Government." *Rock Island A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143. The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners. The Act, 1939 I. R. C. § 22 (k), makes taxable to the husband that part of alimony payments "which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum" payable for support of minor children.

I agree with the Court that this agreement did not "fix" any such amount. To be sure, an amount payable in support of minor children may be inferred from the *proviso* that one-sixth of the payment shall no longer be due, if the children marry, become emancipated, or die. But Congress in enacting this law realized that some portion of alimony taxable to the wife might be used for support of the children, as the opinion of the Court makes clear.

The present agreement makes no specific designation of the portion that is intended for the support of the

children. It is not enough to say that the sum can be computed. Congress drew a clear line when it used the word "fix." Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer.